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No. 37327-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

RIZWANA RAHMAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent,

v.

MOHAMMAD SHAHIDUR RAHMAN, individually
and
MOHAMMAD SHAHIDUR RAHMAN and RIZWANA RAHMAN,
as a marital community,

Third Party Defendants.

BRIEF OF APPELLANT

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Rizwana Rahman appeals from the Thurston County Superior Court's summary dismissal of her personal injury action against the State of Washington. Rizwana was seriously injured while riding in a car driven by her husband, Mohammad Rahman, and owned by his employer, the Department of Ecology.

At the time of the accident, Mohammad Rahman was acting in furtherance of the State's business and within the course and scope of his employment. The State is vicariously liable for his negligent acts under the doctrine of respondeat superior.

A. ASSIGNMENT OF ERROR

1. The trial court erred by granting the State's motion for summary judgment.

Issue Pertaining to Assignment of Error

Do motor vehicle cases present special circumstances that foreclose an employer's liability for injuries to a third party under the doctrine of respondeat superior? (Assignment of Error No. 1)

B. STATEMENT OF THE CASE

Facts

Mohammad Rahman was employed as a summer intern by the Washington State Department of Ecology from June 1 to August 31, 2005. CP 112, 124. Rahman was assigned to the dam safety office. *Id.* His job duties included assisting with drafting, performing engineering calculations and basic data analysis, accompanying senior engineers on inspections, and helping to write reports. CP 124.

Rahman had been working for about two months when his supervisor, Douglas Johnson, assigned him to travel for an inspection. CP 121, 132. Rahman was to drive to Spokane in order to meet a Department hydrologist with whom he would inspect a construction site.¹ CP 113, 115, 132.

Johnson authorized Rahman to sign out the Department's 1999 Jeep Cherokee overnight so that he could leave directly for Spokane the next morning. CP 20, 116, 132.

After work, Rahman learned that his wife, Rizwana, was feeling ill. CP 117. She was also lonely and wanted to go with her husband the next day. CP 118. The couple had been married only

¹ He had not gone to a site visit alone before, but he had driven State vehicles to projects in Wenatchee and Seattle with his colleagues. CP 115-16.

a few months, and she had just moved to Washington. CP 21, 66. Rahman had not taken Rizwana on his business trips before, but he agreed she could ride with him to Spokane. CP 118. They planned for her to stay in the car during the site visit, and then they would drive directly home so Rahman could be back at his office the next day. *Id.*

Rahman did not inform anyone at the Department that Rizwana was going to accompany him. CP 118. When asked for his understanding of his employer's policy about taking his spouse with him, Rahman testified: "I had no sorts of idea. That was my very first job in the U.S. and unfortunately I did not go through all the documents[.]" CP 117.

Rahman and Rizwana left Olympia about 5 a.m. on July 26. CP 103, 117. It was dark and drizzling when they passed Tiger Summit on Highway 18. CP 119. As Rahman drove downhill and turned to the right, the Jeep's right wheel left the road. *Id.* He was unable to regain control. *Id.* The vehicle struck a tree and rolled two or three times. CP 119-20. Rizwana was badly injured. CP 121.

Rahman called his supervisor after the accident. CP 121. Johnson instructed Rahman to tell the State Patrol officer at the scene that Rahman worked for the Department. *Id.* Johnson said

Rahman was using the Department vehicle to travel to Spokane on official business, and he stated that Rizwana's presence did not change that use.² CP 44, 135-36.

Rahman received a letter of reprimand for violating the Department policy that prohibits transporting passengers who are not on official business.³ CP 70.

Procedural History⁴

Rizwana Rahman filed a complaint for personal injuries, naming the State of Washington and Mohamad Rahman as defendants, in Thurston County Superior Court on June 16, 2006. CP 4-6. The complaint was later amended to name the State of Washington as the sole defendant. CP 7-9.

The State filed a third-party complaint, denying its liability and asserting that to the extent it might be found liable for Rahman's actions, it is "entitled to full indemnification from

² Rahman had a valid Washington driver license. CP 45. A signed authorization for him to drive a State vehicle was on file at the time of the accident. *Id.* Johnson testified he was not certain whether Rahman had reviewed the administrative policy concerning operation of Department vehicles before the accident. CP 186. According to Johnson, the Jeep was not insured. CP 44.

³ Disciplinary actions that may be taken for such policy violations include written or verbal reprimand, demotion, suspension, reduction of pay, and termination. CP 134.

⁴ The Verbatim Report of Proceedings consists of two volumes: the transcript of the March 16, 2007 hearing (RP I) and the transcript of the January 25, 2008 hearing (RP II).

Mohammad Shahdur Rahman and full or partial indemnification from the marital community of Mohammad and Rizwana Rahman for any damages, costs and/or fees assessed against it.” CP 14.

Rizwana moved for partial summary judgment, seeking an order determining that the State “is vicariously liable under the doctrine of respondeat superior for the negligent acts of [its] agent, Mohammad Rahman.” CP 19. The State filed a cross-motion, asserting it is not liable for Rizwana’s injuries because, as a matter of law, Rahman’s use of a State vehicle to transport his wife was outside the scope of his employment. CP 49-81.

Argument was heard before Thurston County Superior Court Judge Anne Hirsch on March 16, 2007. CP 98; RP I at 1-19. Summary judgment was denied pending discovery as to whether the State has policies or procedures for authorizing non-employee passengers. RP I at 14-16.

The parties later renewed their motions. CP 99-136, 137-88. Argument was heard before Thurston County Superior Court Judge Chris Wickham on January 25, 2008. CP 216; RP II at 1-19.

The facts were basically undisputed:

Everyone agrees that plaintiff was working for the State of Washington, that there was a policy that prevented plaintiff from having a passenger in a state vehicle on state business. Everyone agrees that plaintiff took his wife on a trip east of the mountains, in violation of the policy. She was injured in an

automobile accident And everyone agrees that plaintiff's operation of the vehicle was negligent[.]

RP II at 5.

The court framed the question at issue as "whether the State has a duty to [Rizwana] under the Doctrine of Respondeat Superior." *Id.*

The court granted the State's motion, ruling as follows:

[T]here is no case law directly on point that has been published, and so I am left with persuasive authority and trying to extrapolate from other authority in the state of Washington.

In looking at all of that and understanding that the Court of Appeals Division II or the Supreme Court at some point may in their infinite wisdom come up with a different result, it appears to me that looking at the Thompson case, looking at the Restatement -- granted, it is a section of the Restatement that has not yet been adopted, but it is nevertheless a section of the Restatement that is entitled to consideration by this court -- looking at the cases from other states such as Ohio which talk about trespass, it occurred to me that the motor vehicle issue is a separate issue in the area of Respondeat Superior, and courts and the Restatement have dealt with it as a separate situation that requires a separate rule and a special treatment and that there is good reason not to apply general principles of respondeat superior in this context. . . . [G]iven that other courts have recognized the special circumstances present here and have come up with rules to limit liability, I find that persuasive, and for that reason I will grant the State's motion to find that there is no liability under the theory of Respondeat Superior under these circumstances.

RP II at 17-18; see also CP 217-19.

Rizwana's appeal to this Court followed.⁵ CP 230-34.

C. SUMMARY OF ARGUMENT

The trial court committed reversible error in ruling, contrary to Washington law, that the special circumstances of motor vehicle cases preclude the State's liability for Rizwana Rahman's injuries under the doctrine of respondeat superior.

D. ARGUMENT

Standard of Review

The appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment; all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001).

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

It is accepted here that the employer-employee relationship existed and that Rahman's negligence was the proximate cause of

⁵ A copy of the Notice of Appeal is included in the Appendix.

Rizwana's injuries. The material facts are not in dispute. The sole issue is the correct legal standard to apply.

Respondeat Superior

Generally, "a party injured by the negligence of another . . . must seek his remedy against the person who caused the injury." *Roletto v. Department Stores Garage Co.*, 30 Wn.2d 439, 442, 191 P.2d 875 (1948).

Under the doctrine of respondeat superior,⁶ however, an employer may be liable to a party injured by the negligence of an employee acting on the employer's behalf.⁷ *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997); *Michael v. Laponsey*, 123 Wn. App. 873, 874, 99 P.3d 1254 (2004).

To hold an employer vicariously liable for the tortious act of its employee, "it must be established that the employee was acting in furtherance of the employer's business and that he or she was

⁶ The basic doctrine has been stated as follows:

A master is responsible for the servant's acts under the doctrine of respondeat superior when the servant acts within the scope of his or her employment and in furtherance of the master's business. Where a servant steps aside from the master's business in order to effect some purpose of his own, the master is not liable.

Kuehn v. White, 24 Wn. App. 274, 277, 600 P.2d 679 (1979).

⁷ The employer and its employee are held jointly and severally liable for the employee's negligent acts, and an injured party may sue both the employer and the employee or either separately. *Johns v. Hake*, 15 Wn.2d 651, 656, 131 P.2d 933 (1942); *Orwick v. Fox*, 65 Wn. App. 71, 80, 828 P.2d 12 (1992).

acting within the course and scope of employment when the tortious act was committed.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 551, 860 P.2d 1054 (1993).

1. Rahman acted in furtherance of the State’s business within the course and scope of his employment.

The State argued it is not liable for Rizwana’s injuries because Rahman’s unauthorized use of the Department’s vehicle to transport his wife was outside the scope of his employment. CP 138-41.

An employee’s conduct is outside the scope of employment when it “is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 53, 59 P.3d 611 (2002) (*quoting Restatement (Second) of Agency* § 228(2) (1958)). There is no evidence that any of these situations arises in this case.

Rahman was driving to Spokane, as directed by his employer, when the accident happened. Under Washington law, an employer may be held liable for an employee’s negligent act *even when that act is contrary to the employer’s instructions.* *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958). “[A]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment.”

Dickinson v. Edwards, 105 Wn.2d 457, 470, 716 P.2d 814 (1986) (quoting *Restatement (Second) of Agency* § 230 (1958)). The *Dickinson* court “emphasized the importance of the benefit to the employer.” *Bratton v. Calkins*, 73 Wn. App. 492, 498, 870 P.2d 981 (1994).

Rahman’s work assignment required him to travel. He did not make the trip for his own purposes. And even if he had also been motivated by self-interest, the State would still be liable:

[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business the employee was actually engaged in when a third person was injured, and the employer will be held responsible unless it clearly appears that the employee could not have been directly or indirectly serving his employer[.]

McNew v. Puget Sound Pulp & Timber Co., 37 Wn.2d 495, 497, 224 P.2d 627 (1950).

At the time Rizwana was injured, Rahman was engaged in the furtherance of his employer’s interest within the course and scope of his employment.

2. The trial court’s ruling is inconsistent with Washington law.

The trial court seems to have based its ruling almost entirely on decisions in other jurisdictions. RP II at 17-18.

As advocated by the State, the court relied on Restatement (Second) of Agency § 242 (1958):

A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.

CP 145; *see also* CP 139-40. *But this section of the Restatement has been neither cited nor adopted by Washington courts.*

In addition, the court mentioned with approval a federal case, which holds that the government is not liable for passengers' injuries where the driver was acting outside the scope of his employment at the time of the accident and that the United States would not be liable *under Ohio law* because those injured were unauthorized passengers in a government vehicle. *Kinsey v. Kinsey*, 98 F. Supp. 2d 834 (N.D. Ohio, 2000).

Judge Wickham characterized the question in the present case as "an issue of new impression" in Washington. RP II at 17. It appears the court overlooked longstanding, controlling authority that addresses employers' vicarious liability in the context of motor vehicle accidents.⁸

⁸ See, e.g., *Elder v. Cisco Const. Co.*, 52 Wn.2d 241, 324 P.2d 1082 (1958); *Smith v. Leber*, 34 Wn.2d 611, 209 P.2d 297 (1949); *Leuthold v. Goodman*, 22 Wn.2d 583, 157 P.2d 326 (1945); *Breedlove v. Stout*, 104 Wn. App. 67, 14 P.3d 897 (2001).

3. The State is vicariously liable for Rizwana's injuries.

Whether an employee acted in the course and scope of his employment is a fact question on conflicting evidence. It becomes a question of law, however, if the facts are undisputed and reasonable minds cannot differ as to conclusions and justifiable inferences drawn from the evidence. *McNew*, 37 Wn.2d at 497.

In this case, Rahman was performing his job functions, at the express direction of his employer, when the accident occurred. The State is vicariously liable for Rizwana's injuries as a matter of law.

E. CONCLUSION

The Court should reverse the trial court's grant of summary judgment to the State and should remand this matter for entry of summary judgment to Rizwana Rahman on liability and for trial on damages.

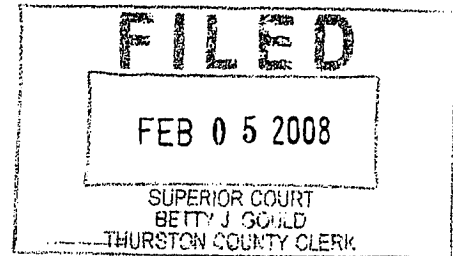
DATED this 18th day of June, 2008.

Respectfully submitted,



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Appendix



SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

RIZWANA RAHMAN,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant/Third Party Plaintiff,

v.

MOHAMMAD SHAHIDUR RAHMAN,
individually and
MOHAMMAD SHAHIDUR RAHMAN
and RIZWANA RAHMAN,
as a marital community,

Third Party Defendants.

NO. 06-2-01110-1

NOTICE OF APPEAL TO
COURT OF APPEALS

Plaintiff Rizwana Rahman seeks review by the Court of Appeals, Division Two, of the Order Granting State's Motion for Summary Judgment entered January 25, 2008.

A copy of the order is attached to this notice.

Dated: February 5, 2008

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CERTIFICATE OF SERVICE

I certify that on February 5, 2008, I sent a true and correct copy of the
foregoing Notice of Appeal by first class mail, postage prepaid, to:

John C. Dittman, Assistant Attorney General
Torts Division - P.O. Box 40126
Olympia, Washington 98504-0126

Dated: February 5, 2008

Anne Watson
Anne Watson, WSBA #30541

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

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BETTY J. GOULD, CLERK

BY _____
DEPUTY

☐ EXPEDITE
☐ No Hearing is Set
☒ Hearing is Set
Date: January 25, 2008
Time: 9:00 a.m.
The Honorable Chris Wickham

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

RIZWANA RAHMAN,

NO. 06-2-01110-1

Plaintiff,

v.

ORDER GRANTING STATE OF
WASHINGTON'S MOTION FOR
SUMMARY JUDGMENT

STATE OF WASHINGTON,

Defendant/Third Party Plaintiff,

v.

MOHAMMAD SHAHIDUR
RAHMAN, individually and
MOHAMMAD SHAHIDUR
RAHMAN and RIZWANA RAHMAN,
as a marital community,

Third Party Defendants.

THIS MATTER coming on for hearing on the Cross-Motion of Defendant, State of Washington for Summary Judgment, said defendant appearing by Robert M. McKenna, Attorney General, and John C. Dittman, Assistant Attorney General, and plaintiffs appearing by their attorney and the court having heard argument, considered the records and files herein, and being fully advised; now, therefore, the court having examined the records and files herein relevant to this motion, including pleadings submitted by both parties as follows:

ORDER GRANTING STATE'S
MOTION FOR SUMMARY JUDGMENT

1

ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
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(360) 586-6300

1 1. Plaintiff Rizwana Rahman's Motion for Summary Judgment regarding
2 Liability of Defendant State of Washington;

3 2. Attached deposition portions in Support of Plaintiff's Motion for Summary
4 Judgment;

5 3 State of Washington's Renewed Cross-Motion for Summary Judgment, with
6 attachments;

7 4. Declaration of Jennifer J. McCaslin, with attachments;

8 5. Declaration of John C. Dittman, with attachments;

9 6. Plaintiff's Reply in Support of Motion for Summary Judgment;

10 7. Plaintiff's Response to Defendant, State of Washington's Cross Motion for
11 Summary Judgment; and

12 8. State of Washington's Response and Reply;

13 and the Court having considered the evidence and deeming itself fully advised in the
14 premises, NOW, THEREFORE


15 IT IS HEREBY ORDERED: That State's motion for summary judgment is
16 GRANTED.

17 DONE IN OPEN COURT this 25 day of January, 2008.

18
19 
20 THE HONORABLE CHRIS WICKHAM

21 Presented by:

22 ROBERT M. MCKENNA
23 Attorney General

24 
25 JOHN C. DITTMAN, WSBA# 32094
26 Assistant Attorney General
Attorneys for Defendant

1 Approved as to form and notice of
presentation waived:

2 

3 KAREN M. KAY WSBA# 36765
4 Attorney for Plaintiff

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ORDER GRANTING STATE'S
MOTION FOR SUMMARY JUDGMENT

3

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY E
DEPUTY

CERTIFICATE OF SERVICE

I certify that on June 18, 2008, I sent a true and correct copy
of the Brief of Appellant by first class mail, postage prepaid, to:

John C. Dittman
Assistant Attorney General
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Olympia, Washington 98504-0126

Dated: June 18, 2008

Anne Watson
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